GEORGE A. WEITZ, INC.
KURT WEITZ

IBLA 99-299 Decided January 14, 2003

Appeal from a decision of the Assistant Field Manager, Nonrenewable Resources, Winnemucca Field Office, Nevada, Bureau of Land Management, establishing the annual rental for a non-linear right-of-way for an irrigation wastewater pump, pipeline, and pond. N-50046.

Affirmed.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rent--Rights-of-Way: Appraisals

BLM properly requires payment of an annual rental for a non-linear right-of-way for an irrigation wastewater pump, pipeline, and pond, where the right-of-way holder fails to show error in BLM's appraisal or that the annual rental is not the fair market rental value of the right-of-way.

APPEARANCES: George A. Weitz, Caldwell, Idaho, for George A. Weitz, Inc., and Kurt Weitz.

OPINION BY ADMINISTRATIVE JUDGE PRICE

George A. Weitz, Inc., and Kurt Weitz (the Weitzes) have appealed from an April 7, 1999, decision of the Assistant Field Manager, Nonrenewable Resources, Winnemucca (Nevada) Field Office, Bureau of Land Management (BLM), establishing the annual rental for their non-linear right-of-way, N-50046, for an irrigation wastewater pump, pipeline, and pond. 1/

BLM originally issued the subject right-of-way grant to the Travelers Insurance Company (Travelers) on February 2, 1989, for a term of 30 years, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1994). The right-of-way grant authorizes the construction, operation, and maintenance of an existing

1/ George A. Weitz, Inc. and Kurt Weitz each hold a 50 percent interest in the BLM right-of-way.

pump, pipeline, and pond, which are used to gather and store irrigation wastewater, for eventual reuse on nearby private agricultural lands. The pump, pipeline, pond, and related facilities cover close to five acres of public land situated in lot 1, sec. 4, T. 44 N., R. 37 E., Mount Diablo Meridian, Humboldt County, Nevada, near the Quinn River.

The Weitzes are the current holders of the right-of-way grant by virtue of BLM's July 1, 1998, approval of a June 23, 1998, assignment. In its July 1, 1998, decision approving the assignment, BLM stated: "The Assignee is bound by all the terms and conditions of the original grant."

Section 3 of the right-of-way grant provides that the holder agrees to pay BLM the

> fair market value rental as determined by the authorized officer unless specifically exempted from such payment by regulation. Provided, however, that the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental value as determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices. [Emphasis added.]

Initially, however, BLM charged an "estimated rental" of $25 for the first five-year period beginning February 2, 1989, pursuant to 43 CFR 2803.1-2(a) and 2803.1-2(e)(2) (formerly 43 CFR 2803.1-2(a) and 2803.1-2(c)(3)(ii) (1994)). 2/ (Letter to Travelers, dated Jan. 17, 1989.) It also charged this rental for the second five-year period beginning February 2, 1994, on the basis of the conclusion that "Justification for the low rent is due to the fact that the site is currently not being used as designed. If the property were being farmed, the ponds being utilized, this would justify an increase in rent to be paid for the use of the property, however, this has not occurred." (Memorandum to Land Law Examiner, Winnemucca District (now Field) Office, Nevada, BLM, from Realty Specialist, Winnemucca District Office, dated Oct. 27, 1993.)

2/ Regulation 43 CFR 2803.1-2(e)(2) authorizes BLM, when granting a right-of-way, to "estimate rental" to "expedite the processing of [the] grant." It further states that BLM will "collect a deposit in advance with the agreement that[,] upon completion of a rental value determination, the advance deposit will be adjusted according to the final fair market rental value determination." Id. Here, BLM estimated that the annual rental was $5, which BLM then chose to charge for successive five-year periods, pursuant to 43 CFR 2803.1-2(a). In the end, the $25 charged was a "deposit," which would later be adjusted, once BLM determined the actual rental. However, BLM has chosen not to make such adjustment with respect to the rent charged for the 10-year period from Feb. 2, 1989, to Feb. 1, 1999.

By letter dated November 18, 1998, the Field Office required payment of $25 for the third five-year period, beginning February 2, 1999, on or before the February 2, 1999, due date. It also notified the Weitzes that it was in the process of having their right-of-way appraised by the Chief State Appraiser, Nevada State Office, BLM, and that, in accordance with 43 CFR 2803.1-2(e)(2), "[a]ny additional rental that is determined to be due as the result of the [appraised] rental [value] determination shall be paid upon request." (Letter to the Weitzes, dated Nov. 18, 1998, at 2.)

The Weitzes paid the third $25 five-year rental on November 27, 1998.

On March 17, 1999, Jeffrey W. Surber, a BLM appraiser, prepared an "Appraisal Report," which concluded that the fair market rental value of the Weitzes' non-linear right-of-way was $350 per year, as of March 11, 1999. Surber utilized the comparable sales method of appraisal. 3/ He determined the fair market sales value of the subject parcel of public land, 4/ which contains "5 acres, more or less," by comparing it to four parcels of private land which had sold between June 1995 and April 1998 (for from $800 to $912 per acre), and then converted that sales value into an annual fair market rental value. (Appraisal Report at 1, 4-5.) Comparable parcels of private land were selected on the basis that highest and best use was for "rural homesite purposes," and were fairly comparable in terms of location, character of the land, parcel size, access, availability of utilities, and other factors which were thought to influence the fair market sales value. 5/ Id. at 2, 3-4.

Utilizing this process, Surber concluded that the subject parcel had a fair market sales value of $901 per acre (or a total of $4,505 for five acres) as of March 11, 1999. (Appraisal Report at 4.) He then reduced

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3/ Surber did not employ the cost and income appraisal methods because the land is vacant and does not produce income. (Appraisal Report at 1.)

4/ In the Appraisal Report Surber noted that, although he was provided a map depicting the location of the parcel, because the land had not been surveyed at the time the report was prepared, he was "unable to determine the exact location of the property." Instead, he relied on recognizable "geographic features" to locate the approximate boundaries of the parcel. (Appraisal Report at 2-3.) Surber stated that he is familiar with the area and has "travelled through the immediate area many times in the past and has completed appraisal assignments in the surrounding area in a wider area over the last 11 years." Id. at 1. Appellants have not directly questioned whether Surber failed to locate the right parcel, and we do not construe their assertion that the "property does not have access" (Notice of Appeal) to implicate any such question.

5/ In the case of the four comparable sales, each of which was identified by a sale number, Surber provided the month/year of the sale, the acres sold, and the price per acre. (Appraisal Report at 4.) In addition, in a "Sales Comparison Table," he rated each of the sales as positive, negative, or zero, in terms of their comparability to the subject parcel, based on those factors thought to influence market value, namely, time of the sale,

this value by five percent to account for the fact that the Weitzes would have 95 percent of its fee value if they owned the property, given their current encumbering use ($4,505 x .95 = $4,280). Id. at 5. Surber finally converted this sales value to an annual fair market rental value of $342.40 (rounded to $350), by applying an eight-percent rate of return ($4,280 x .08 = $342.40). Id. at 5. The Appraisal Report was approved by the Chief State Appraiser on March 30, 1999.

In his April 1999 decision, the Assistant Field Manager notified the Weitzes that BLM had determined that the rental for their right-of-way was to be $350 per year, based on the March 1999 Appraisal Report. After prorating the annual rental for the remainder of the calendar year (from Apr. 1, to Dec. 31, 1999) to put the billing cycle on a calendar year basis as required by 43 CFR 2803.1-2(a), and crediting the $25 already paid, the Assistant Field Manager required payment of $237.50 within 30 days of receipt of the decision. 6/ See "Determining Calendar Year Rental" attached to decision.

The Weitzes paid the $237.50 on April 22, 1999, and on April 30, 1999, they timely appealed from the Assistant Field Manager's April 1999 decision.

In their notice of appeal/statement of reasons for appeal (Notice of Appeal), appellants object to BLM's determination that the annual rental for their right-of-way is $350, raising three arguments. They argue, first, that the highest and best use of the public land covered by their right-of-way is not as a "potential building site," but rather as "first class grazing." They rest this argument solely on their assertion that the land "is not being used as, and cannot be used as a building site," because it "does not have access." Second, appellants argue that a "7000% increase in rent in one calendar year is unfair." Third, they argue that, because the land is being used as a wastewater pond to conserve water, neither the "current or future use of this right-of-way justifies this type of commercial evaluation."

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fn.5 (continued)
terms of the sale, location, character of the land, parcel size, access, presence of water, availability of utilities, and improvements. Id. Surber generally noted that "[f]actual information regarding the sales ha[d] been gathered from the owner, research of public records, and inspection," and that additional information concerning the sales was to be found in the appraiser's "work file." Id. at 1, 2. The BLM appraiser's representations regarding the comparability of the other sales to the subject parcel is assumed to be correct, under the presumption of regularity, absent clear evidence to the contrary. Evelyn Alexander, 45 IBLA 28, 36-37 (1980) (citing United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)).

6/ The effect of BLM's decision was that the right-of-way was rent-free for two months, from Feb. 2, to Mar. 31, 1999.

[1] BLM is mandated by section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1994), and its implementing regulation, 43 CFR 2803.1-2(a), to require the holder of a right-of-way grant to pay rental in advance annually, on the basis of its "fair market value," as determined by BLM. 43 U.S.C. § 1764(g) (1994); see, e.g., Michael D. Dahmer, 132 IBLA 17, 24 (1995).

In the present case, BLM determined the appropriate fair market rental value of appellants' right-of-way based on an appraisal. It is well established that such a determination will not be overturned unless the appellant demonstrates, by a preponderance of the evidence, that BLM's appraisal methodology was fatally flawed, that it failed to consider a relevant factor bearing on value, used inappropriate data, erred in its calculations, or that the rental arrived at does not, in fact, represent the right of way's fair market rental value. Private Line Communications, 143 IBLA 346, 353 (1998); Gifford Engineering, Inc., 140 IBLA 252, 263-65 (1997); Michael D. Dahmer, 132 IBLA at 24 25; Quality Broadcasting Corp., 126 IBLA 174, 188 (1993); Voice Ministries of Farmington, Inc., 124 IBLA 358, 361 (1992).

Use of the comparable sales method of appraisal to determine the appropriate fair market rental value of a right-of-way finds ample sanction in the Board's caselaw. See, e.g., Southern California Sunbelt Developers, Inc., 154 IBLA 115, 120-21, 127 (2001); V. Irene Wallace, 122 IBLA 349, 351, 354 (1992); Meyring Livestock Co., 69 IBLA 110, 111 (1982). We have upheld appraisals where BLM has first determined a fair market sales value for a parcel of public land, by identifying private sales that are comparable in terms of various market factors which affect sales value, and, to the extent that there are dissimilarities, disclosed the differences and their impact on value, and made whatever adjustments in the value are necessary to account for such differences. We have thus upheld the resulting calculation of fair market rental value of the parcel by reference to its fair market sales value, using an appropriate rate of return.

The ability to determine the fair market sales value of a parcel of public land using the comparable sales method of appraisal depends, to a large degree, on identifying the appropriate highest and best use for that parcel, because it guides the selection of the comparable private parcels. In the present case, Surber, who was familiar with the area where the subject parcel is located, identified the highest and best use as a rural homesite:

> The [subject] property is located in north-central Humboldt County in an area characterized by farming and other agricultural uses with scattered rural homesites. Based upon the current use, size, utility availability, and other factors, as well as uses in immediate surrounding areas, the highest and best use is determined to be for rural homesite purposes. A 5± acre site in this area would most likely be used for this type of purpose.

(Appraisal Report at 2.)

Appellants dispute Surber's determination of the highest and best use of the subject parcel, arguing that, absent access, it is not being and cannot be used as a "potential building site."

As the Board stated in Western Slope Gas Co., 61 IBLA 57, 58-59 (1981), quoting from the Uniform Appraisal Standards for Federal Land Acquisitions (1973) (UAS):

> The basis for the comparison of land [using the comparable sales method of appraisal] is an initial determination of the "highest and best use for which the property is clearly adapted." Uniform Appraisal Standards at 6-7 * * *. Such "use" is defined in Uniform Appraisal Standards at 7:
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> > By highest and best use is meant either some existing use on the date of taking, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions. [7/] [Emphasis added.]

The UAS relies upon the decision in Olson v. United States, 292 U.S. 246, 255 (1934). In that case, the Supreme Court stated:

> The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered * * * to the full extent that the prospect of demand for such use affects the market value while the property is privately held. [Citations omitted; emphasis added.]

See also Exxon Corp., 106 IBLA 207, 210-11 (1988); Black Hills Power & Light Co., 73 IBLA 199, 201-02 (1983); Western Slope Gas Co., 61 IBLA at 62-63.

7/ The UAS was promulgated by the Interagency Land Acquisition Conference and adopted by the Department. It governs the valuation of private lands which have been acquired by the United States by condemnation, but has long been relied upon by BLM in valuing rights-of-way. 602 Departmental Manual 1.3 (Rel. 2589 (9/12/84)) ("[The UAS] standards are to be used as a guide by all bureaus and offices"); see BLM Manual § 9310.06(B) (Rel. 9-355 (10/27/99)).

Farming, grazing, and rural homesites are all found in the vicinity of the subject parcel. (Appraisal Report at 2.) Indeed, Surber stated that the parcel is situated about 55 miles from Winnemucca, Nevada, which is the "closest town with all typical services" in the 15- to 20-mile-wide Quinn River Valley, where land uses are "almost exclusively livestock grazing, irrigated crop production, and rural housing." Id. He also noted that the immediate "[s]urrounding uses include farmland, livestock grazing, and residences associated with the ranching and farming in the area." Id. at 3. By virtue of various factors, Surber deemed the parcel to be physically and otherwise suited to use as a rural homesite. Id. at 2. In particular, he noted that the parcel is currently vacant, is close to five acres in size, is accessible by means of a road which runs along the northern boundary of the property, and has electric and telephone service at the northeastern corner of the property. Id. at 2-3. Surber concluded that the parcel was "most likely" to be used for rural residential purposes. Id. at 3. We find no reason to question that determination.

We thus conclude that BLM has adequately substantiated its conclusion that the highest and best use of the subject parcel is as a rural homesite. As stated, appellants' contention to the contrary rests solely on their assertion that the property "does not have access." They are mistaken in this assertion, because the parcel is reported to be "on the south side of Codr [sic] Road 2 miles west of U.S. 95." (Appraisal Report at 2.) Moreover, their error is evident from a map and photographs of the parcel contained in the Appraisal Report, and a U.S. Geological Survey topographic map (Orovada Quadrangle (1959)) attached to Travelers' original November 7, 1988, right-of-way application. Appellants do not identify any physical or other impairment which has precluded or may preclude use of the land for a rural homesite, apart from the alleged lack of access. They have thus failed to overcome, by a preponderance of the evidence, BLM's conclusion that the highest and best use of the parcel is as a rural homesite.

The Weitzes do not otherwise challenge Surber's use of the comparable sales method of appraisal, the parcels of private land he selected for comparison, his determination of the fair market sales value of the subject parcel based on that comparison, or the formula employed by Surber to convert that sales value into an annual fair market rental value. Appellants have not offered a competing appraisal, or even named the fair market rental value for their right-of-way. Accordingly, we find that BLM properly appraised the fair market rental value of appellants' right-of- way. Valley Pioneers Water Co., Inc., 125 IBLA 326, 329-30 (1993).

The Weitzes also argue that the increased annual rental is "unfair" and is inappropriate because their right-of-way serves the purpose of conserving water. We recognize that the increased annual rental represents a significant increase, at least percentage-wise. However, this increase mostly results from the fact that the original rental was not determined by appraisal or by any means calculated to discern the actual fair market rental value of the right-of-way. It was, from the very beginning, merely an estimated rental, at best a rough approximation of the fair market rental value of the right-of-way. Even had the estimate been based on

a calculation, however, 10 years had elapsed since issuance of the right-of-way grant when BLM finally appraised the grant as of March 11, 1999. Thus, some portion of the increase is attributable to the passage of time and changed circumstances impacting the fair market rental value of the right-of-way. We do not find the annual rental to be exorbitant, and the magnitude of the increase has no bearing on whether $350 per year now constitutes the fair market rental value of the right-of-way in any event. Since appellants' allegations are insufficient to demonstrate that the appraisal method is incorrect or that the rental is exorbitant, only another appraisal convincingly establishing that the rental is excessive would justify setting aside BLM's decision. Michael D. Dahmer, 132 IBLA at 25, 27, and cases cited therein.

In concluding, we note that BLM has discretionary authority to adopt a lesser rental than the appraised fair market rental value or waive the rental in certain circumstances. That option is available to BLM under section 504(g) of FLPMA, which provides, in relevant part:

> Rights of way may be granted * * * to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary * * * for such lesser charge, including free use[,] as the Secretary * * * finds equitable and in the public interest.

43 U.S.C. § 1764(g) (1994); 43 CFR 2803.1 2(b)(2)(ii).

In addition, 43 CFR 2803.1 2(b)(2)(iv) provides that BLM may authorize a reduced rental or may waive it where it "determines that the requirement to pay the full rental will cause undue hardship on the holder/applicant and that it is in the public interest to reduce or waive said rental." 8/

Appellants' statements regarding the conservation of water suggest that they may intend to avail themselves of section 504(g) of FLPMA. The Weitzes did not apply for any such reduction or waiver, however, and thus the issue is prematurely raised before this Board. Although there is no specific statutory or regulatory provision for reducing or waiving annual rental on the ground of the "unfairness" of an increase, to the extent that this contention is properly understood to allege undue hardship, it too is a matter that should be adjudicated by BLM in the first instance. Nothing

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8/ We have held that FLPMA's legislative history, specifically that set forth at S. Rep. No. 583, 94th Cong., 1st Sess. 72-73 (1975), limits the waiver of any rental charge to situations where the right-of-way holder is an agency of the Federal government, or the charge is token and collection costs are unduly large. Crawford Mesa Water Association, 150 IBLA 14, 16-17 n.4 (1999); City of Redding, 91 IBLA 82, 84 (1986); Tri-State Generation & Transmission Association, Inc., 63 IBLA 347, 351 n.1, 354, 89 I.D. 227, 229 n.1, 231 (1982).

herein prevents the Weitzes from pursuing such a request after the case is returned to BLM. See, e.g., Jacqueline Balander, 125 IBLA 262, 266 (1993). 9/

We therefore conclude that the Assistant Field Manager properly determined the annual rental for appellants' right-of-way to be $350, and properly required payment in accordance with that determination.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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T. Britt Price
Administrative Judge

I concur:

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James F. Roberts
Administrative Judge

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9/ We note that the record indicates that BLM has expressed its willingness to entertain a reduction of the size of the area covered by their right-of-way from five to one or two acres. See Memorandum to Field Manager, Winnemucca Field Office, from Chief State Appraiser, dated Apr. 13, 1999; BLM Conversation Record, dated Apr. 26, 1999. This appears to correspond more closely with the area of public land actually used by appellants for their irrigation wastewater pump, pipeline, and pond. Should appellants pursue an amendment of the right-of-way grant to reduce the acreage involved, see Thousand Peaks Ranches, Inc., 129 IBLA 397, 401 (1994), the result would be a lowering of the annual rental to $150 (one-acre site) or $300 (two-acre site), from that time forward. Amendment of the right-of-way grant to accomplish such a reduction may, of course, be pursued by appellants.